

### **REMARKS/ARGUMENTS**

Applicant has carefully reviewed the Final Office Action mailed on May 30, 2008. Claims 1-4, 6-11, 14-16, 18-22, 28, and 29 remain pending and have been rejected. In this amendment, claims 1, 11, 18, 21, 28, and 29 have been amended, and the amendments are supported, for example, by Figures 12-14. No new material has been added. Applicant respectfully traverses all objections, rejections, and assertions made by the Examiner. Favorable consideration of the above amendments and the following remarks is respectfully requested.

#### **Claim Rejection(s) under 35 U.S.C §102**

Claims 1, 3-6, 9, 11, 18-19, 21-22, and 28-29 were rejected under 35 U.S.C. §102(b) as being anticipated by Burgin (U.S. Patent No. 4,156,424). Applicant respectfully traverses this rejection.

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). “The identical invention must be shown in as complete detail as is contained in the ... claim.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). (MPEP 2131).

The Examiner asserts that “at least a portion of the Burgin paddle (area 66 for example) is pivotal about a respective generally horizontal axis between an open and closed position. In differentiating between the open and closed positions at least the inner part of the paddle (66) can meet the claim limitation where it is along a horizontal position and then in a perpendicular position.” Applicant notes that the claims do not recite “the inner part of the paddle”, but instead make claims to “the first paddle” and “the second paddle” as it pertains to the horizontal and perpendicular orientations. If the entire Burgin paddles are considered, they do not appear to read on the current claims.

However, in the interest of furthering prosecution, Applicant has amended claims 1, 11, 18, 21, 28, and 29 to further differentiate the claimed invention from the cited reference. The application now claims to distract the vertebrae apart “in a direction generally

perpendicular to a plane between the horizontal axes". Burgin's speculum does not appear to be able to perform this limitation.

Applicant asserts that Burgin does not appear to disclose each element of the currently claimed invention. Therefore, Applicant believes that Burgin does not anticipate independent claims 1, 11, 18, 21, 28, and 29. Accordingly, claims 3-6, 9, 19, and 22, which depend from the above claims and add additional elements thereto, are also believed to not be anticipated by Burgin. Applicant respectfully asserts that the claims are in condition for allowance and requests that the rejection be withdrawn.

#### **Claim Rejection(s) under 35 U.S.C §103**

Claim 10 was rejected under 35 U.S.C. §103(a) as being unpatentable over Burgin (U.S. Patent No. 4,156,424) in view of Brantigan (U.S. Patent No. 5,425,772). Claims 14 and 15 were rejected under 35 U.S.C. §103(a) as being unpatentable over Burgin (U.S. Patent No. 4,156,424) in view of Baynham et al. (U.S. Patent No. 6,224,599). Claims 2, 7, 8, 16, and 20 were rejected under 35 U.S.C. §103(a) as being unpatentable over Burgin (U.S. Patent No. 4,156,424). The Applicant respectfully traverses the rejections.

\*\* "All words in a claim must be considered in judging the patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). (MPEP 2143.03).

Applicant asserts that Burgin does not disclose each element of independent claims 1, 11, and 18, as discussed above. Since the independent claims are believed to be allowable, and these dependent claims add additional elements thereto, Applicant asserts that claims 2, 7, 8, 10, 14, 15, 16, and 20 are also allowable and respectfully requests withdrawal of the rejections.

**CONCLUSION**

Reexamination and reconsideration are respectfully requested. It is respectfully submitted that the claims are now in condition for allowance. Issuance of a Notice of Allowance in due course is requested. If a telephone conference might be of assistance, please contact the undersigned attorney at (612) 677-9050.

Respectfully submitted,

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By his attorney,

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